



Paving the middle ground: Court balances insolvent claimant's rights with defendant's cross-claim in adjudication enforcement

The Supreme Court's 2020 ruling in [Bresco v Lonsdale](#) confirmed there is no outright bar to an insolvent company pursuing adjudication and seeking enforcement of a decision in its favour. The difficulty arises when there's a genuine cross-claim against the insolvent party, the question being: is it fair for a solvent party to be ordered to pay an adjudicator's award, only for the insolvent party to be unable to repay if it turns out the cross-claim is valid?

The recent case of *Malin Industrial Concrete Floors Ltd v Volkerfitzpatrick Ltd [2024]* revisited this troublesome issue. It provides further evidence that the courts will seek to achieve pragmatic solutions designed to resolve the tensions between the construction and insolvency regimes — protecting the legitimate interests of solvent parties while preventing the tactical use of insolvency to avoid payment of an adjudicator's award.

Key takeaways:

- Insolvent companies can in principle obtain enforcement of an Adjudicator's decision, but this will not be easy where there are genuine counterclaims or set-offs from the solvent party.
- To balance the parties' competing interests, the Court is likely to stay the enforcement so the defendant can bring its cross claim.
- Be sure there is substance to any cross claim before seeking to resist enforcement. The Court will not tolerate using insolvency tactically as a shield to avoid proper payment of an adjudicator's award.

Background

In April 2022, Volkerfitzpatrick Limited (“**Volker**”) engaged Malin Industrial Concrete Floors Limited (“**Malin**”) as its sub-contractor for concrete flooring works at a development in Doncaster (“**the Contract**”). Malin completed the works, and a final sub-contract sum of £3.9m was agreed.

Malin entered into administration during the defects rectification period. A dispute then arose over the release of the final retention payment, in the sum of £59,950.

Volker argued that it had already spent a significant amount of money fixing alleged defects in the flooring and might need to spend more in the future. Under insolvency law, Volker believed it had the right to hold onto the retention amount as security for its cross-claim, which it said amounted to £66,000.

Malin's administrator commenced an adjudication seeking release of the retention.

By a decision dated 11 April 2024, the Adjudicator determined that Volker was not entitled to withhold payment of the retention. Since Volker had opted not to provide evidence in support of its cross-claim in the adjudication, the Adjudicator decided the net final position between the parties was as set out in the final account.

Volker was ordered to pay Malin the sum of £59,950 plus VAT, interest and fees (“**the Decision**”).

Arguments during enforcement proceedings

Malin sought summary judgment to enforce the Decision but declined to provide any security for the cross-claim, other than offering to accept a 3-month delay in payment (stay of execution) while the cross-claim was pursued by Volker. Malin argued that Volker had wrongly sought to “*subvert the purpose of adjudication by lightly trailing a cross-claim*”, instead

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of actually advancing such claim during the adjudication.

Volker resisted enforcement on the basis that:

- It had a clear and substantial cross-claim for more than the retention sum.
- Although Malin's offer to stay payment until the cross-claim was resolved would prevent the retention sum from being lost to Malin's creditors, it did not shield Volker from the significant legal costs of pursuing its claim. Simply, there was insufficient security to protect Volker if in the meantime it was required to pay in accordance with the Decision.

Held

The judge, District Judge Baldwin, granted summary judgment in favour of Malin but the judgement was stayed pending further order, to allow Volker to pursue its cross-claim.

The Court, however, gave permission for Malin to apply to lift the stay after three months if by that point it had not been satisfied by Volker that the cross-claim was genuine and likely to extinguish the Adjudicator's award. In essence, this put the onus on Malin, in the face of any further evidence presented by Volker, to consider whether it had a valid defence to the cross-claim rather than on Volker to immediately commence a formal claim (and incur considerable legal fees).

The judge's reasoning includes the following points of interest:

- Expert reports provided by Volker, although they didn't expressly state the flooring works were defective, raised several "*points of substance*." The judge determined that Volker's arguments showed enough to suggest the possibility of a cross-claim was real rather than fanciful. It was

therefore necessary to consider Volker's objections to enforcement.

- In this particular case, "*the adjudicator was not deciding the net balance between the parties after consideration of any cross-claim.*" Had the cross-claim been determined during adjudication, it may have strengthened the case for immediate enforcement.
- Given Malin's insolvency, and the absence of any security for costs, there would be a "*real risk*" that immediate summary enforcement would deprive Volker of access to the retention as security for any cross-claim. While lack of security was not a complete bar to enforcement, the judge considered that a stay was appropriate in the circumstances.

Analysis

While this case doesn't create any new points of law, it further illustrates the difficulties faced by insolvent companies hoping for a fast resolution through adjudication. The usual robust approach to enforcing adjudication awards will be tempered where insolvency is involved, and companies in administration or liquidation can expect to face issues around security for costs whenever there are cross-claims or set-offs from the solvent party which have not been determined in the adjudication.

In such cases, the Court is likely to adopt a cautious approach designed to protect the interests of both parties involved.

Those opposing enforcement will need to persuade the court that the potential for a cross-claim is real rather than fanciful, if a stay is to be granted. A bare assertion will not be sufficient and the courts appear increasingly concerned that insolvency should not be used as a tactical tool to avoid compliance with an adjudicator's decision.

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